Office Supreme Court, U. S.
FILED.
NOV 8 1912
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1912

No. 646

THE STATE OF FLORIDA, ON THE RELATION OF SYDNEY I. WAILES,

PLAINTIFF IN ERROR,

vs.

A. C. CROOM, AS COMPTROLLER OF THE STATE OF FLORIDA,

DEFENDANT IN ERROR.

BRIEF ON MOTION TO DISMISS

PARK M. TRAMMELL,
W. S. JENNINGS,
E. J. L'ENGLE,
Attorneys for Defendant in Error.

THE DREW PRESS, JACKSONVILLE 247430

Supreme Court of the United States

THE STATE OF FLORIDA, ON THE RELATION OF SYDNEY I. WAILES,
Plaintiff in Error,
vs.
A. C. CROOM, AS COMPTROLLER OF THE STATE OF FLORIDA,
Defendant in Error.

October Term, 1912.. No. 646.

BRIEF

On the Motion to Dismiss.

STATEMENT OF FACTS.

The action was brought in the Circuit Court of the Second Judicial Circuit of the State of Florida, in and for Leon County, seeking a writ of *mandamus*, to compel A. C. Croom, then Comptroller of the State of Florida, to audit and settle certain claims for money alleged by the relator to be due him from the State of Florida. The writ was denied and on appeal to the Supreme Court of Florida a judgment affirming the decision of the trial judge was rendered January 6th, 1912.

On February 6th, 1912, the respondent A. C. Croom died while still holding the office of Comptroller. His successor was promptly appointed and qualified. On April 11th, 1912, the attorneys for the plaintiff in error presented a petition for a writ of error to Mr. Justice Lamar, without any attempt at a substitution of parties,

which was granted. On May 4th, 1912, citation duly issued herein, citing and admonishing *A. C. Croom*, as Comptroller of the State of Florida, to be before this Court within thirty days time and defend this cause, etc.

No application has been made to any Court to make the present Comptroller a party to the proceedings; no order or citation requiring him to defend has been served upon him.

ARGUMENT.

We rely upon the case of United States *ex rel.* Bernardin vs. Butterworth, 169 U. S., 600, in which this Court said:

"In United States vs. Boutwell, 84 U. S., 604, it was held that in the absence of statutory provision to the contrary, a mandamus against an officer of the government abates on his death or retirement from office, and that his successor in office cannot be brought in by way of amendment of the proceeding, or on an order for the substitution of parties. The conclusion reached was put upon two independent grounds, and we quote the reasoning of the court, expressed in its opinion delivered by Mr. Justice Strong, as follows: ' * * * It necessarily follows, that on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary. When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And if a successor in office may be substituted, he may be muleted in costs for the fault of his predecessor, without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty and render the interposition of the court un-

necessary. At all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative. And, even if the retirement of the defendant from office and his consequent inability to perform the act demanded to be done, does not abate the writ, or necessitate its discontinuance, there is still an insuperable difficulty in the way of our directing the substitution asked for. We can exercise only appellate power. We have no original jurisdiction in the case. But any summons issued, or rule upon the successor in office, requiring him to become a party to the suit, would be the exercise of original jurisdiction over both a new party and a new cause, for the duty which he would be required to perform would be his own, not that of his predecessor.' "

See also

Cox vs. U. S., ex rel. McGarrahan, 9 Wall. (76 U. S.) 298.

Warner Valley Stock Co. vs. Smith, 165 U. S., 28.

The line of decisions of this Court represented by Murphy vs. Utter, 186 U. S., 95, is not pertinent or controlling, because the respondent here is not a continuing public body or board the existence and duties of which are unaffected by death or resignation of its members, which was the controlling and distinguishing feature of Murphy vs. Utter and similar cases. The distinction is between applications for mandamus against "a head of a department or bureau for a personal delinquency, and those against a continuing municipal board with a continuing duty, and the delinquency is that of the board in its corporate capacity" (Murphy vs. Utter, supra). In the case at bar the duty sought to be enforced is purely personal and discretionary. If plaintiff in error has a cause of action at all, it is based solely upon a "personal

delinquency" of the late Comptroller of Florida. There has been no delinquency on the part of the present Comptroller, and no opportunity has ever been given to him to act on the Wailes claim. It cannot be assumed that he would entertain the same opinion as that of his predecessor in office, or take such a position as would render a writ of mandamus necessary. To extend the functions of this writ to Comptroller Knott would be to deprive him of his discretionary powers, and to bind him by the personal views of his predecessor, which, if the opportunity existed, he might disaffirm.

It is manifest that the act sought to be commanded is in its nature a matter of personal discretion, and one to which the language of this Court in the Butterworth case is peculiarly applicable. There is not even a remote similarity or analogy between the present case and that of Murphy vs. Utter, because the duty of examining, auditing and settling a claim against the State is purely personal, and refusal to perform this duty, if it be unjustified, is not a wrong which attaches to the office or which binds subsequent incumbents of the office.

Neither can it be successfully contended that the act of Congress of February 8th, 1899, (30 Stats. at Large 822) has any bearing upon this controversy. That act is expressly limited to proceedings against "the head of a Department or Bureau of the United States in his official capacity or in relation to the discharge of his official duties." The act does not attempt to regulate the practice in mandamus proceedings in State Courts, or to give the Supreme Court of the United States power to authorize new parties to be brought into a suit, pending

an appeal, when such suit had abated by death before writ of error was applied for.

RULE 15 NOT APPLICABLE.

Rule 15 of this Court, providing a method whereby plaintiff may suggest the death of a defendant pending an appeal, and obtain an order requiring "the proper representatives in personalty or realty of the deceased party" to become parties to the suit, obviously has no application here. It will be noted that in the decision just quoted, the Court expressly holds that the successor in office of the deceased official is not in privity with his predecessor, much less is he his predecessor's personal representative.

And the same question was considered in another part of the quoted opinion, where it was urged that the statute of Maryland provided that no action should abate by the death of either of the parties to such action. This Court said:

"We are unable to perceive that this statute, either in its terms or its spirit, is applicable to cases like the present one. Neither the heir, devisee, executor or administrator of a deceased official would have any legal interest in such a controversy. Nor, in the case of a resignation, could the successor be said to be 'a person interested on the part of the defendant.'"

RULE IN FLORIDA SUPREME COURT.

There is no statutory authority in Florida providing for the substitution of a successor in office as a party, upon the death or retirement of the incumbent.

The question whether such substitution may be compelled and the successor required to defend, upon the *death* of the incumbent, has never been passed upon by the Supreme Court of Florida. In the case of the *expiration of the term of office*, the Florida Court has expressly held that the writ abates, where no application has been filed to make the successor a party or to require him to defend; and the Court has left it an open question whether or not such a change of parties could be enforced in any event, against the resistance of the successor in office.

The case referred to is State of Florida *ex rel.* Williams vs. Bloxham, 42 Fla. 501 (1900), a mandamus case in which the Court said in part:

"The proceeding can not be regarded in any sense as a suit against the State, because the State cannot in our courts be sued by an individual. The proceeding is, therefore, either a personal one against the defendant as an individual to compel him to perform a personal duty devolving upon him because of his official position, or it is one against the official which appertains to the office of Comptroller, regardless of the person who actually occupies it. In either event, the result must be the same, for in the one case the power of the defendant to perform the required duty, and in the other his power to represent the office or official sought to be coerced in this litigation, has ceased to exist, by reason of the expiration of his term of office. If we should direct the writ to the defendant, he would be without power to do the act commanded, and if we should direct it to his successor in office, the latter could properly complain that he had been commanded without an opportunity to be heard, and that an administrative office of the executive department of the government had been coerced upon a defense made by one whose power to represent such office had ceased. In

State ex rel. Patton vs. Bloxham, Comptroller, 33 Fla., 482, the proceedings were begun against Comptroller Barnes, but by agreement they were continued against his successor, who approved the official acts of his predecessor brought in question and adopted the return filed by him, but no such agreement has been entered into in this case. The present Comptroller not being a party to these proceedings or representing the defense thereof, and there being no application to make him a party or to require him to defend, we can do nothing but dismiss the suit. Warner Valley Stock Co. vs. Smith, 165 U. S. 28; Fox vs. Trinidad Waterworks Co., 7 Colo. App., 401; State vs. Guthrie, 17 Neb., 113, and authorities cited therein.

"We do not mean to decide that the suit finally abates by the expiration of the term of office of a defendant State official in mandamus proceedings, and that the proceedings cannot be continued as against his successor upon notice to him, as is held in some of the cases cited, for that question is not now involved; nor do we by this decision come in conflict with anything decided in County Commissioners vs. Bryson, 13 Fla., 281, and State *ex rel.* Andreu vs. Canfield, 40 Fla., 36. In the class of cases considered in those decisions, the duties sought to be compelled rested upon a corporation or municipality subject to be sued, but were required to be performed by and through the instrumentality of certain officers or agents for and on behalf of the corporation or municipality."

No aid or comfort can be found in the foregoing decision on behalf of any proceeding to force and compel the successor in office of an official whose term has expired, to become a party to the suit and defend it.

The general reasoning employed by the Florida Court, which is quite similar to the reasoning of this Court in the Butterworth case, is entirely inconsistent with the theory that such substitution of parties could be enforced. And

the presumption is strong that the Florida Court would hold that in case of the death of an official while in office, the action against him would finally abate, for there is a great distinction recognized between death and mere expiration of term of office:

Thus it is said in 26 CYC. 420:

"In the absence of statutory provision to the contrary, mandamus against a public officer abates on the death of defendant."

United States vs. Butterworth, supra.
People vs. Lantry, 88 N. Y. App. Div., 583.

"Expiration of term of office of defendant. No uniform rule. It cannot be denied that there is a sharp conflict of authority on this question. The federal courts, as well as some of the State courts, proceeding upon the theory that the proceedings are directed, not against the government, of which defendant is an officer, but against the officer himself, have decided that the proceedings abate upon the expiration of defendant's term of office, whether by his own resignation or otherwise."

"This rule applies as well after judgment and pending appeal therefrom as before."

26 CYC., 421.
Seymour vs. Nelson, 11 App. Cas. (D. C.) 58.
Warner Valley Stock Co. vs. Smith, 165 U. S., 28.

Summarizing this argument, so far as the Florida courts are concerned, we would say:

(1) There is no statutory provision or rule of court in Florida to compel or permit a substitution of parties.

(2) The Florida Court holds that the suit abates where there is no agreement to the contrary, and does not hold that substitution of parties can be compelled.

Therefore, there is nothing in the state laws or decisions to prevent this Court from following the rule of the federal courts.

RESPONDENT DIED BEFORE APPEAL.

The plaintiff in error is peculiarly delinquent, in that, although Comptroller Croom died soon after the judgment of the Supreme Court of Florida, yet the plaintiff sued out a writ of error against the deceased, and caused citation to be issued against him. It is evident that as the defendant in error was not in existence at the time the writ of error was sued out, there is properly speaking no cause before this Court at all, and the motion to dismiss should be granted.

Park M. Trammell

Wm. Jennings

E. J. C. Engle

Attorneys for Defendant in Error.